

Resolution

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: 53/1993. (X. 13.) AB (On War Crimes); original published in Hungarian in *Magyar Közlöny*, 1993, p. 147; English translation by courtesy of the staff of the Court. <http://www.icrc.org/ihl-nat>]

RESOLUTION IN THE NAME OF THE REPUBLIC OF HUNGARY Constitutional Court Docket No: 288/A/1993

On the basis of the petition submitted by the President of the Republic concerning the constitutional review of the provisions of the law passed by the National Assembly but not yet proclaimed, the Constitutional Court has made the following resolution:

1. In the application of article 33 (2) of [...] the Penal code [...] it is a constitutional requirement that the non-applicability of statutory limitations may only be determined with respect to those criminal offenses which have not lapsed according to Hungarian law in effect at the time of the commission of the offense; except if international law classifies the offense as a war crime or crime against humanity, declares or makes possible the non-applicability of statutory limitations, and Hungary has assumed the obligation by international law to preclude the applicability of statutory limitations.
2. The Constitutional Court holds that it is consistent with the Constitution if article 33 (2) of the Penal Code is applied without regard of the Hungarian statutory limitations in effect at the time of the commission of the following offenses defined by international law:
 - “Grave violations of rights” as defined by the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, concluded in Geneva on August 12, 1949, applied to all cases of declared war or of any other armed conflict between two or more of the High Contracting Parties, as determined by common

article 2 of the Geneva Conventions, concluded on August 12, 1949;

– prohibited acts in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, [...] as determined by common Article 3. [...]

Reasoning

I.

1. On February 16, 1993, the National Assembly enacted the law “concerning the procedures in the matter of certain criminal offenses committed during the 1956 October revolution and freedom struggle,” (hereinafter referred to as “the Law”).

The text of the Law is the following: [...]

Article 2, section (1): Of the Geneva Conventions on the protection of the victims of war, concluded on August 12, 1949 and acceded to by Law 32 of 1954, in connection with:

a) article 130 of the August 12, 1949 Convention Relative to the Treatment of Prisoners of War, based on article 3 (1); and

b) article 147 of August 12, 1949 Convention Relative to the Protection of Civilian Persons in Time of War, defining “grave violations of rights”, based on article 3(1), concerning the applicability of statutory limitations for the punishment of criminal offenses committed during the 1956 October revolution and freedom struggle – also noting article 1 (a) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, accepted by the United Nations Assembly on November 26, 1968, and entered into force by Law I of 1971, article 33 (2) of the Penal Code must be applied. [...]

2. According to article 33 (2) of the Penal Code, no statutory limitation of punishment may be applied to the following offenses:

a) war crimes, [...]

b) other crimes against humanity (Chapter XI); [...]

IV.

The particular characteristics of war crimes and crimes against humanity

In the presently discussed case the interpretation of both the Constitution and domestic law must proceed in light of the fact that the norms regulating war crimes and crimes against humanity comprise a particular part of international law, one which involves not merely responsibilities of nations with respect to one other, but

also the determination of obligations and imposition of criminal liability onto individuals as well. By this action, therefore, international law touches upon such an area which otherwise falls within the sovereign state's domestic penal power, and it does so, with respect to war crimes and crimes against humanity, in a manner which, in many respects, diverges from the basic principles and application of domestic penal law.

1. In the cases of war crimes and crimes against humanity, such criminal offenses are involved whose classification did not arise as part of the domestic law's criminal taxonomy, but are deemed to constitute criminal offenses by the international community which defines their elements. [...]

2. The international community prosecutes and punishes war crimes and crimes against humanity; it does so by international trials and, second, by insisting that those states which desire to be members of the international community prosecute such offenders. [...]

3. Therefore, the state which prosecutes and punishes crimes against humanity and war crimes, acts upon the mandate given to it by the community of nations, according to the conditions imposed by international law. The community of nations occasionally may also demand, through the action of international organizations, to review and reject that domestic legal practice which does not comply with international law. [...]

4. The prosecution and punishment of war crimes and crimes against humanity may only proceed within a framework of legal guarantees; it would be self-contradictory to protect human rights without such guarantees. But these international guarantees cannot be replaced or substituted by the legal guarantees of domestic law.

a) [...] [T]he development of international law has since continuously separated the sphere of "international humanitarian law" from the war context, and has also made the prosecution and punishment of these crimes independent of the requirements and conditions of the domestic penal, including with respect to statutory limitations of the applicability of punishment, so much so that two conventions have been concluded on the non-applicability of statutory limitations for war crimes and crimes against humanity.

b) [...] The aim of the 1968 New York Convention (Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 U.N.T.S. 73 [available on <http://www.icrc.org>]) was precisely the termination of the uncertainties and randomness associated with various domestic laws when the Convention declared that the war crimes and crimes against humanity enumerated therein "do not lapse irrespective of the date of their commission". (Translated from the Hung. ed.) From the Convention's preamble it is evident that war crimes and crimes against humanity, on the one hand, and "ordinary criminal acts," on the other hand, cannot be treated in an identical manner. [...]

Article 7 (2) of the European Convention [for the Protection of Human Rights and Fundamental Freedoms]

and article 15 (2) of the International Convention [on Civil and Political Rights] permit in principle for signatory states not to apply the domestic statutory limitations for crimes defined by the community of nations. In contrast, the New York Convention replaces this permissive provision with a mandatory one. Moreover, the New York Convention is retroactive. [...]

V.

Criminal offenses defined by international law and the Constitution

1. [...] The regulations of war crimes and crimes against humanity are undoubtedly part of customary international law; they are general principles recognized by the community of nations or, in the parlance of the Hungarian Constitution, they are among “the rules generally recognized by international law.” [...]

4. [...]

b) It is “on the basis” of the “grave violation of rights” defined in the August 12, 1949, Geneva Convention relative to the Protection of Civilian Persons in Time of War, and by considering article 1 (a) of the New York Convention of 1968 which prohibits the application of statutory limitations for prosecuting and punishing war crimes and crimes against humanity, that article 2 of the Law orders the application of article 33 (2) of the Penal Code to the criminal offenses committed during the 1956 October revolution and freedom struggle.

The “grave violations of rights” of common article 2 of the Geneva Conventions refer to international armed conflict. For armed conflict of non-international (domestic) in nature, the behaviors deemed prohibited are defined by common article 3. In separate articles, the Conventions define precisely and in a detailed manner the sphere of protected persons; only against these categories of persons can the “grave violation of right” be committed. [...] In contrast, common article 3 applies “at any time and in any place whatsoever” to all persons “taking no active part in the hostilities”.

The drafting of the Law conflates several regulations of the Geneva Conventions addressing different subject matters and categories of protected persons and creates a connection among them which does not appear in the Conventions. Domestic regulation may not alter the content of an international agreement. Hence, the constitutional concerns raised concerning the text of the Laws is justified.

The Constitutional Court points out that the New York Convention of 1968 imposes the non-applicability of statutory limitations requirement not only on those behaviors prohibited under the Geneva Conventions which qualify as “grave violations or rights”. Article I (a) of the New York Convention – upon whose “consideration” the Law mandates the application of article 33 (2) of the Penal Code – does, indeed, refer to “grave violations of rights,” but as an example of the war crimes defined by the Nuremberg International Military Tribunal. According to article I, “independent of their commission, the statutes of limitations of the following criminal offenses do not lapse: a) the war crimes defined by the August 8, 1945, Charter of the

Nuremberg International Military Tribunal, especially those which are enumerated as “grievous violations of rights”. (tran. from Hung. ed.).

The activities enumerated in common article 3 of the Geneva Conventions constitute crimes against humanity and they contain those minimal requirements which every State Party in an armed conflict is obligated to comply with and which are “at any time and in any place” are prohibited (in contrast with the scope of application of “grievous violations of rights”). According to the common article 3 (2) of the Geneva Conventions, the States Parties to a conflict may enter into force other provisions of the Conventions by separate agreement and, indeed, State Parties shall endeavour to do so. Thus, the punishment of the “grievous violations of rights” in article 3 requires a separate agreement.

But according to the International Court of Justice, the prohibitions registered in article 3 are based on “elementary consideration of humanity” and may not be breached in the course of any armed conflict, irrespective whether it is international or domestic in nature. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J.4 (June 27) at 114 [See Case No. 153, ICJ, *Nicaragua v. United States*]. It is also by reference to the definition of crimes against humanity that article 3 of the Conventions is invoked by the U.N. Report (para. 47) authorizing the creation of an International Tribunal for the prosecution of crimes committed in the territory of the former Yugoslavia.

Thus, the statute of limitation for the punishment of the activities enumerated in common article 3 of the Geneva Conventions does not expire either; in case these offenses do not fall within the category of war crimes defined by article I (a) of the New York Convention – either with respect to the scope of protected persons or because of the manner of the commission of the act – they would be unavoidably covered by the non-applicability of statutory limitations requirement imposed by article I (b) of the Convention on crimes against humanity.

c) [...] The Constitutional Court points out that the appropriateness of classifying a specific criminal offense a war crime or crime against humanity is, in the last instance, supervised by the community of nations, in the event those cases are submitted to international human rights committees or tribunals.

d) [...] Thus, whether the proclamation of the Geneva Conventions has properly taken place is of no moment, nor whether the obligation assumed by the Hungarian state to implement them had occurred prior to the date designated by the Law as the temporal limit of its scope (October 23, 1956, that is). The criminal liability of the commissioners remains by international law and subsequent domestic legislation may give effect to the full scope of liability. [...]

Budapest, 1993 October 12

[...]

Discussion

1. Art. 2 of the Hungarian law addresses crimes occurring in what type of conflict? Is the type of conflict relevant to the application of IHL? If so, how? Does the Court implicitly or explicitly qualify the events that occurred in 1956 in Hungary?

2. a. In what type of conflict are the provisions on “grave breaches” as defined by the Geneva Conventions (or “grave violations of rights”, the phrase translated from Hungarian and used by the Court), applicable? (GC I-IV, Arts 50/51/130/147 respectively)

- b. Does the concept of grave breaches also cover violations of Art. 3 common to the Geneva Conventions? If not, does the Hungarian law make this distinction? Does the Court? What does the Court mean when it says that “the Law conflates several regulations of the Geneva Conventions addressing different subject matters and categories of protected persons and creates a connection among them which does not appear in the Conventions?” (See section V.4.b. of the decision.)

3. According to the Court’s deliberations, to which classification of crimes are statutory limitations non-applicable? Are violations of common Art. 3 considered to be such crimes? If so, under which classification?

4. Are all violations of common Art. 3 crimes against humanity? [See also ICTY, *The Prosecutor v. Tadic* [Part B. and Part C.]]

5. Under international law, is it obligatory to exclude certain crimes from application of a statute of limitations? (E.g. ECHR, Art. 7(2) ; ICCPR, Art. 15(2); 1968 New York Convention (Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity)) Does the obligation laid down in IHL to repress grave breaches preclude application of a statute of limitations? (CIHL, Rule 160)